

Parkash (Migration) [2018] AATA 4820 (6 September 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Deepak Parkash
CASE NUMBER:	1621721
DIBP REFERENCE(S):	BCC2014/1487837
MEMBER:	Moira Brophy
DATE:	6 September 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 06 September 2018 at 3:50pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – genuine relationship – parties not living together – minimum contact with sponsor’s family – third parties statements provided – Departmental dob in – failure to provide additional information – credibility issues – evasive responses to Tribunal questioning – decision affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB, 5F, 359AA, 375A
Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cl 820.211*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

1. ISSUE

2. The issue in the present case is whether the applicant, Mr Deepak Parkash, and his sponsoring spouse, Ms Lynda Margaret Gasnier, are in a genuine and continuing spousal relationship.

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 8 December 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 17 June 2014 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied the applicant was the spouse of the sponsor as defined under section 5F and 5 CB of the Migration Act.
6. The applicant, Mr Deepak Parkash appeared before the Tribunal on 19 March 2018 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

8. Background

9. The applicant is a 31-year-old male from India. He has not declared any previous relationships. His parents, his brother and his two sisters reside in India.
10. He arrived in Australia on 25 October 2008 on a student visa (subclass 573). On 2 October 2012 he was granted a further student visa (subclass 572) to cease on 2 July 2014.
11. The applicant applied for the partner visa which is the subject of this review on 17 June 2014. He has remained on a bridging visa since that time.
12. The sponsor is an Australian citizen by birth born on 24 December 1995 (22 years old). She has not declared any previous relationships. Her parents, four brothers and one sister reside in Australia.
13. On their application form the parties claim to have first met at Parramatta Shopping Centre on 15 March 2014, they were married on 11 May 2014. A copy of their marriage certificate is in the Department's file.
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- 15.

16.

17. Tribunal Proceedings

18. The applicant told the Tribunal he was currently living in Queensland. He had been there for the past 4 to 5 months. He was living with a friend in a two-bedroom unit. His share of the rent was \$150 per week. The residential tenancy agreement is in his friend's name.
19. The applicant said he was currently working as a courier driver on a casual basis and he earned between \$700 and \$1000 per week. Those monies were electronically transferred into an account in his name.
20. The applicant said that the sponsor was living in Minto with her parents and she was not in paid employment. He said she had not been in paid employment during the course of their relationship and was in receipt of a Centrelink payment but he had no idea which payment she received.
21. The applicant said that his parents, one brother and two sisters were living in India and he last saw them three years ago when he had gone to India before he was married. He has not seen his parents since his marriage and members of his family have not met his wife. He speaks to his family twice a week.
22. The applicant said the parents of the sponsor lived in Sydney as did her brother. When put to him that on their application it was stated the sponsor had four brothers and one sister the applicant said that she had only one brother. He said he was not especially familiar with her family as they had never really liked him but he had met one brother.
23. When asked how he and the sponsor had met the applicant said in April 2014 or maybe it was February 2014 they had met at the Parramatta Shopping Centre. He said they had married at the Campbelltown Registry Office on 11 May 2014. He then said that it was not at Campbelltown but he could not remember where it was that they had actually married. He said around 15 people attended their marriage. He said the parents of the sponsor did not attend as they did not like him. He said after the ceremony they had had a get together in the park with their guests.
24. When asked about their finances he said that the parties did have a joint account but he had not used that account. He said that they did not have shared loans or shared savings.
25. The applicant said that the parties had lived at Harris Park for around three years and he had moved out of that address six months ago. He said that he did not have a job as he had lost his license and therefore was unable to continue his work as a courier. He said the problems between them were 50 to 60% attributable to financial problems.
26. The applicant said that there were no children of the relationship.
27. When asked by the Tribunal the applicant said he last spoke to the sponsor about two months ago. He said he had texted her to advise of the hearing date that she had said she would not attend.
28. During the period when they lived together the applicant said he and the sponsor shared the house work. The applicant said that he did the grocery shopping but the sponsor did the washing as she was not working at the time and she did the cooking.
29. When asked what social activities they had engaged in the applicant said that they did not have very much social life as her friends were not supportive of their relationship. He said

that she spent time with her family but he only went with her to see them on three or four occasions as initially they were not supportive of the relationship either. He said that their behaviour changed after the first couple of years and they became better with him but he said they did not speak nicely to him which caused some tension. He said he and the sponsor had been happy at first but the tension with her friends and family contributed to their breakdown. They had been together for four years and had lived together for 3 ½ years. The applicant said it was not about the visa, he would just like to get the relationship back.

30. The applicant was put on notice that there was a 375A certificate on his Departmental file. A copy of that certificate was shown to the applicant and his agent and he was asked to comment on its validity. The Tribunal member explained the significance of that notice and the Tribunal view it was a valid notice.
31. [Paragraph deleted].
32. The Tribunal gave an adjournment to allow the applicant to make submissions on the matters raised with him pursuant to the section 375A certificate on file and under section 359AA of the Act for any evidence he may wish to provide to the Tribunal.
33. On 5 April 2018 following a request from the Migration Agent acting on behalf of the applicant the time for the making of submissions was extended to 19 April 2018.
34. As at the date of this decision no further submissions had been received.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

35. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
36. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

37. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage in Sydney on 11 May 2014 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds that the marriage between Mr Deepak Parkash and Ms Lynda Margaret Gasnier is a valid marriage for the purposes of the Migration Act, as required by s.5F(2)(a) of the Act.

Are the other requirements for a spousal relationship met?

38. The applicant gave evidence that he was currently in paid employment in Brisbane as a courier driver. He is employed on a casual basis and he earns between \$700 and \$1000 per week which is transferred electronically into an account in his name. The sponsor is not employed and is in receipt of a Centrelink income. He was unsure as to the basis on which she was paid.
39. The applicant is currently sharing a unit with a friend in Brisbane. The sponsor resides with her parents in Sydney.
40. The Tribunal requested copies of bank statements for all account (Including loan and credit cards) held in the name of the applicant, the name of the sponsor and in joint names for the period from March 2016 to the time of hearing. Those statements were not provided.
41. On the evidence before the Tribunal there was no evidence of any joint ownership of real estate or other major assets, or any joint liabilities.
42. There was no evidence of any pooling of financial resources, especially in relation to major financial commitments; and there was no evidence either party owed any legal obligation in respect of the other.
43. As at the time of decision there was no evidence of any sharing of day to day household expenses.
44. The Tribunal places limited weight on this aspect of the relationship.

45. Nature of the household

46. The applicant claimed at the hearing that the parties had lived together since their marriage in May 2014 for three and a half years. The applicant gave evidence at hearing that the sponsor does the cooking and the washing and that they shared the housework. He said he did the grocery shopping.
47. The applicant said there were no children of the relationship.
48. The Tribunal was not prepared to accept in the absence of any corroborating evidence the parties have in fact resided together since their marriage. The Tribunal places limited weight on this aspect of the relationship.

Social aspects of the relationship

49. The evidence in relation to this aspect of the relationship was somewhat lacking. The Tribunal did have the benefit of some photographic evidence but it did not have the benefit of oral evidence from witnesses who had observed the parties together since their marriage.
50. At the time of application two Form 888's were provided from friends of the applicant and sponsor. They were completed in May 2014, the same month the applicant and sponsor were married. While both opined the relationship to be genuine and continuing given the timeframe the statements were not considered to be cogent evidence of a genuine and continuing relationship. The Tribunal did not have any evidence subsequent to that to make a finding that their friends and acquaintances still considered them to be in a genuine and continuing spousal relationship

51. Based on the photographic evidence of the mother of the sponsor with the visa applicant and sponsor the Tribunal was satisfied the parties represent themselves to their families as being married to each other and that their immediate family members consider them to be in a genuine and continuing spousal relationship.
52. Based on the evidence the Tribunal is not satisfied that at the time of decision the social aspects of the relationship were consistent with the parties being in a genuine and continuing relationship.

Nature of the persons' commitment to each other

53. The evidence as to the parties commitment to each other was, when considered in its totality confused and unconvincing. While at the time of hearing the visa applicant spoke of his commitment to the marriage and of his hopes of getting the relationship back on track with the sponsor, the Tribunal was not convinced, on the evidence, that the commitment to the marriage was a mutual commitment. The Tribunal was concerned the overriding commitment of the visa applicant was to ensuring he was able to stay in Australia on a permanent basis rather than it being a commitment to his partner. His case was not assisted by the failure of the sponsor to attend the hearing.
54. At the time of hearing the visa applicant's evidence was evasive, confused, conflicting and unconvincing. He was not familiar with details of the sponsor's life such as the members of her family and the payments she received from Centrelink. The Tribunal considered these to be details the visa applicant would have known had he been residing with the sponsor for an extended period as claimed. The Tribunal was concerned there was a lack of candour in the giving of the evidence in an attempt to present his present relationship as being a genuine and continuing relationship rather than a relationship that had irretrievably broken down.
55. There was no evidence the parties provided each other with companionship and emotional support.
56. The Tribunal finds that the parties know each other personally and the Tribunal is satisfied there is ongoing communication between the parties. However, the Tribunal is not satisfied that the parties were, at the time of application, or are currently in a genuine spousal relationship. The Tribunal is not satisfied on the evidence that the visa applicant is committed to a shared life as husband and wife to the exclusion of all others.

CONCLUSIONS

57. Given the above findings, the Tribunal is not satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. The Tribunal is not satisfied that the parties live together or do not live separately and apart on a permanent basis. The Tribunal therefore finds that Mr Parkash does not meet the definition of 'spouse' in s.5F(2)(b)-(d).
58. Therefore, Mr Parkash does not meet cl.820.221(2)(a). There is no evidence that Mr Parkash meets any of the alternative subclauses of cl.820.221.
59. Consequently, he cannot meet cl.820.221.
60. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

61. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).